

Service Date: April 13, 1990

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of NORTH HILL TRUCK LINES, INC.,)	
Helena, Montana, for a Class C)	DOCKET NO. T-9442
Certificate of Public Convenience)	
and Necessity.)	ORDER NO. 5973

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Cordell Johnson, Attorney at Law, P.O. Box 1715, Helena, Montana 59624

FOR THE PROTESTANT:

William O'Leary, Attorney at Law, 309 Geddis, Helena, Montana 59601, appearing on behalf of Keller Transport

Hugh Sweeney, Attorney at Law, P.O. Box 2175, Billings, Montana 59103, appearing on behalf of H.F. Johnson, Inc.

Jerome Anderson, Attorney at Law, P.O. Box 866, Helena, Montana 59624, appearing on behalf of Hornoi Transport, Inc. and Dixon Bros., Inc.

FOR THE COMMISSION:

Charles Evilsizer, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

CLYDE JARVIS, Chairman
JOHN B. DRISCOLL, Commissioner
WALLACE W. "WALLY" MERCER, Commissioner

BACKGROUND

On July 24, 1989 the Montana Public Service Commission (PSC or Commission) received an application from North Hill Truck Lines, Inc. (North Hill or Applicant) requesting approval of an intrastate certificate of public convenience and necessity as a Class C motor carrier of petroleum products in bulk in tank vehicles between all points and places in the State of Montana.

Following proper notice of the application, the PSC received protests from L.L. Smith Trucking, Black Hills Trucking, Inc., Hornoi Transport, Inc., Dixon Brothers, Inc., H.F. Johnson, Inc. and Keller Transport, Inc.

On October 5, 1989 the Applicant filed a proposed contract for transportation services with "Town Pump, Inc. and Affiliates"; and a signed contract was filed prior to the hearing.

On October 19, 1989, the Applicant, through its attorney, and Black Hill Trucking, through its attorney, David L. Jackson, filed a written stipulation agreeing that the application would prohibit the transportation of Mercer-type commodities and Black Hills Trucking would withdraw its protest.

A public hearing was properly noticed on the application, and held on October 19, 1989. All of the Protestants except Black Hills Trucking and L.L. Smith Trucking appeared at the hearing.

SUMMARY OF TESTIMONY

The Applicant's first witness was Mr. Glen Jenkins of Helena, Montana, President and owner of North Hill Truck Lines, Inc. He testified as follows: North Hill is a Montana corporation which has been in existence for approximately six and a half or seven years. It currently hauls refined petroleum products for Town Pump and Affiliates pursuant to a written lease agreement, which was admitted in evidence later during the hearing as Exhibit No. 5. A new lease, in substantially the same form, is currently in effect. Mr. Jenkins has worked in the transportation business for 40 years, 18-19 of those years involved in the transportation of petroleum products. He is currently a member of the Executive Board of Directors of the Montana Motor Carriers Association, and on the Safety Council.

North Hill currently employs eight full-time drivers (although the number varies seasonally) and one designated safety employee. Its terminal (including shop facilities) is located in Helena, and it has parking areas in Great Falls and Butte. Three telephone lines are in the main office for communicating with Town Pump stations. North Hill's supervisor contacts the stations regularly to obtain tank readings and arrange loads. Because of changes in gasoline pricing practices, North Hill will sometimes only have seven hours to make a delivery before a price change. North Hill has not always been successful in meeting this deadline, and calls upon common carriers for

assistance at times. Mr. Jenkins also stated that North Hill's financial condition would enable it to acquire more equipment if it becomes necessary.

Mr. Jenkins stated that North Hill intends to comply with all Montana PSC and Federal Department of Transportation regulations if granted the certificate.

The following exhibits were identified and admitted through Mr. Jenkins' testimony:

Exhibit No. 1: North Hill equipment list.

Exhibit No. 2: North Hill financial statement (December 31, 1988).

Exhibit No. 4: Delivery Ticket.

Exhibit No. 6: Invoice/Bill of Lading.

On cross-examination, Mr. Jenkins stated that North Hill's points of origin are Helena, Bozeman and Great Falls; and their points of destination are generally within a 150 mile radius of Helena. Mr. Jenkins was then questioned regarding Exhibit No. 5: He stated that the insulated trailers listed therein have been sold. The hauling fee is based upon the tariffs filed by all Class B petroleum carriers in Montana. He said that the 27% (Town Pump) - 73% (North Hill) hauling fee split was based upon North Hill's use of Town Pump's equipment, listed in Paragraph 11 of Exhibit No. 5.

Mr. Jenkins was then cross-examined concerning Exhibit No. 2: He thought that a salary to him of \$1,500 per month was included on page 3 as part of "drivers' salaries." Two months ago this was reduced to \$1,200 per month. He receives a salary of about \$22,000 per year from Diamond J Ranch Co. Dave Richards is a driver, dispatcher and "safety officer" for North Hill, but does not have time to drive anymore.

On further cross-examination, Mr. Jenkins stated that sometimes North Hill is paid by "Northwest Petroleum," instead of Town Pump, but he considers it to be a subsidiary of Town

Pump. North Hill also pays the cargo insurance for the trailers leased from Town Pump. He also pointed out that some of the equipment listed on Exhibit No. 1 is being purchased from the Bank under a "lease program." The remaining trailers listed on Exhibit No. 1 are being leased from Town Pump, and have been for five or six years. Mr. Jenkins then answered a few questions clarifying Exhibit No. 2.

Mr. Jenkins stated he believed that Town Pump had originally drafted the lease agreement (Exhibit No. 5). He does not have any authority from the PSC to operate under the lease agreement. North Hill pays the G.V.W. fees for the leased equipment. Dave Richards supervises the drivers, including hiring and firing. He is in charge of the drivers' logs and records also. He has been employed by North Hill for six years. He is in the process of buying North Hill stock. He has no employment relationship with Town Pump. North Hill has operated under a lease agreement with Town Pump like Exhibit No. 5 for 6 1/2 years. If the requested authority is granted a new contract would be entered into with Town Pump, requiring the same rates as the common carriers (Tariff 29A). The equipment lease would then become a separate agreement. Mr. Jenkins then described two accidents involving North Hill in the past two years. Town Pump prepared and filed the accident reports, but they were signed by Dave Richards.

The Applicant's second witness was Mr. Jim Kenneally, Town Pump Supply and Distribution Manager. Town Pump is a family business started by Jim Kenneally's father 37 years ago. Jim Kenneally has worked in the business for 15 years. He testified in support of the application.

Mr. Kenneally testified that Town Pump and Northwest Petroleum are "affiliated" but could not describe the exact legal relationship between the two entities. He said that either Town Pump or Northwest Petroleum owns all the fuel delivered by North Hill.

He then described the two types of Town Pump stations, "SO"- salaried operation and "DO"- dealer operation (See Exhibit No. 3). North Hill delivers to both. He said Town Pump needs terminal locations in Glendive, Billings, Laurel, Bozeman, Helena, Great Falls, Cut Bank and Missoula. Town Pump purchases gasoline from Exxon, Conoco, Cenex, Montana Refining and others.

Mr. Kenneally then testified that Town Pump has utilized the services of common carriers, but has not experienced problems with their service in the past two years. Only about 1 percent of their deliveries have been by common carrier during the last two years, and 8-10 percent the past five years. The Commission disallowed evidence concerning incidents of alleged unsatisfactory service by common carriers more than two years old. He then described some of the services provided by North Hill which are not always provided by the common carriers. These include the "H2O Test," "Temp" and "Temp Conv. Gallons" information appearing on the Delivery Tickets (Exhibit No. 4) and miscellaneous maintenance at the stations.

Mr. Kenneally then described the effect of the gasoline pricing practices in more detail. He stated that price changes are usually effective at midnight, and it is essential that the trucks be loaded before that time. He said it is common for the price to change once or twice per week. By using the services of North Hill and some minimal use of common carriers, he has largely been successful at meeting these deadlines.

On cross-examination, Mr. Kenneally stated that Town Pump has used the services of Dixon Bros., Hornoi, Keller, and Northern Tank Lines in the past two years. He further stated that Town Pump has a supply contract with Exxon, which assures them of gasoline when supplies are low. "American Trading Corporation" is another "affiliate" of Town Pump, but Mr. Kenneally could not describe the exact form of the entity or its relationship with Town Pump. Town Pump has similar "lease agreements" with Mr. Houghten in Billings and Mr. Veith in Missoula. Hornoi hauls for Town Pump out of Glendive.

During Mr. Keneally's testimony, Exhibit No. 3 (Town Pump Store List) was identified and admitted. Exhibit No. 5 (Lease Agreement) was admitted upon the motion of Protestant H.F. Johnson.

DISCUSSION AND ANALYSIS

At the conclusion of Applicant's case, the Protestants moved to dismiss the application on the following grounds:

- A. Failure to prove public convenience and necessity;
- B. The shipper has only stated a "preference" for the Applicant's services;
- C. Existing common carrier services have not been found wanting or their service unsatisfactory;
- D. The identity of the shipper is unclear and the certificate would be difficult to enforce, since the Applicant's evidence failed to clearly define the affiliates of Town Pump.

E. The failure to present a specific service proposal, lack of testimony regarding the volumes transported and the frequency of loads needed, and the failure to prove that the Applicant can meet those needs.

F. PSC Certificate No. 2846, owned by Northwest Trucking, Inc., apparently an affiliate of Town Pump, already authorizes the transportation of petroleum products in the western part of Montana.

G. Granting a Class C petroleum products certificate would undermine the "traditional" Class B petroleum products common carriage system in Montana.

H. Evidence of an illegal operation under the existing agreement between Town Pump and North Hill.

The Commission must consider several elements in judging an application for a Certificate of Public Convenience and Necessity. The first consideration is the Applicant's fitness, i.e., whether or not it is a suitable carrier to operate in Montana. The evidence in this case revealed that the Applicant has transported petroleum for approximately six years under a "lease agreement" with Town Pump. The Applicant apparently does not haul for any other shipper and does not have any transportation authority from the Commission. Applicant appears to be financially sound and to have the financial ability to sustain the proposed operations. The Applicant has the intention of providing the service sought, and appears to own or lease sufficient equipment and facilities to provide the service. There was no showing that the Applicant lacks the experience or expertise to provide the service. Past illegal operations are another factor in determining the fitness of the

applicant and this is discussed in Paragraph 25 below. Overall, the Commission concludes that the Applicant satisfies the fitness test.

The next question is whether or not public convenience and necessity require that the Commission grant the requested authority. Section 69-12-323(2), MCA, provides:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued.

In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

The concept has perhaps best been described in the landmark case of Pan American Bus Lines Operation, 1 M.C.C. 190 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

1 M.C.C. at 203.

The Applicant has failed to meet its burden pursuant to these tests, and grants the protestants motion to dismiss. Specifically, the Applicant has failed to show that the a public demand or need for transportation service exists which cannot be met by existing common carriers.

No evidence was presented that existing carriers' service is unsatisfactory, unable to meet the

demand, or otherwise lacking. The Commission concurs in the grounds for dismissal asserted by the Protestants described in Paragraph 21 A, B and C above.

The Protestants also asserted that the evidence of alleged illegal operations by North Hill is an additional basis for denying the application. Past illegal operation is a consideration under the threshold fitness test (Paragraph 22 above). It should be noted that although past illegal operation is a factor to be considered, it is not an absolute bar to granting transportation authority. The Commission notes that the "lease agreement" (Exhibit No. 5) under which North Hill has operated for six or seven years has some very questionable provisions which give rise to serious concerns that its operation may be contrary to the intent of the Montana Motor Carrier Act.

CONCLUSIONS OF LAW

The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, Montana Code Annotated.

The Commission has provided adequate public notice and opportunity to be heard to all interested parties in this matter. Montana Constitution Art. II, Sec. 8, Title 2, Chapter 4, MCA and § § 69-12-321 and 69-12-322, MCA.

The Commission concludes that the public convenience and necessity does not require authorization of the proposed service. The Commission has given due consideration to the transportation service being furnished by other existing transportation agencies, the likelihood of the proposed service being permanent and continuous throughout 12 months of the year, and the effects upon other transportation services. § 69-12-323, MCA.

The Applicant has failed to meet its burden of proof with respect to public convenience and necessity and the Protestants' motion to dismiss should be granted. § 69-12-323, MCA and ARM 38.2.1501.

ORDER

The application in this docket for a Class C Certificate of Public Convenience and Necessity authorizing the transportation of petroleum and petroleum products is hereby DENIED and the Protestants' motion to dismiss the application is GRANTED.

Done and Dated this 13th day of April, 1990 by a vote of 3 - 0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.